Supreme Court
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UNITED STATES SUPREME COURT
NO. 00M84

GEORGE TRUDEL, JR.
Petitioner

V.

DONALD VAUGHN, SUPERINTENDENT
DISTRICT ATTORNEY OF PHILADELPHIA
ATTORNEY GENERAL OF
PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI

On Petition For Writ of Certiorari to the United States Court of Appeals for the Third Circuit, No. 00-1099.

Counsel for Petitioner:

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24 pp

QUESTION PRESENTED FOR REVIEW

1. Did the petitioner make a substantial showing of the denial of a constitutional right where the petitioner did not testify during his murder trial, the petitioner claimed his lawyer made the decision not to put him on the stand and the record in the trial court and post conviction court is ambiguous as to whether the petitioner made a personal, knowing and intelligent waiver of his right to testify?

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BASIS FOR JURISDICTION

On December 8, 2000 the United States Court of Appeals for the Third Circuit entered the following order in this case:

"The request for a certificate of appealability is denied. Petitioner failed to make a substantial showing of the denial of a constitutional right. 28 U.S.C. Section 2253 (c)(2)."

This Court has jurisdiction to review the denial of a request for a certificate of appealability. Hohn v. United States, 524 US 236, 253, 118 S. Ct. 1969, 141 L. Ed. 2d 242 (1998).

STATEMENT OF THE CASE

On December 18, 1988 a jury in the Court of Common Pleas of Philadelphia, Pennsylvania, convicted the petitioner of Second Degree Murder, Criminal Conspiracy and Possessing an Instrument of Crime. (Commonwealth v. George Trudel, August Term, 1987, Nos. 2299-2302) The petitioner was sentenced to life imprisonment. The petitioner filed a direct appeal in the Superior Court of Pennsylvania. The Superior Court affirmed the judgment of sentence on January 10, 1990. On or about October 23, 1990 the Pennsylvania Supreme Court denied the petitioner's petition for allowance of appeal.

On September 10, 1992 the petitioner filed a Post Conviction Relief Act petition in the Court of Common Pleas. (Commonwealth v. George Trudel,

August Term, 1987, Nos. 2299 - 2302) The petition for post conviction relief was based on two (2) grounds: First, the petitioner claimed his constitutional right to testify was denied when his lawyer made the decision not to put him on the witness stand during the trial . Second, the petitioner claimed his lawyer was ineffective because he failed to call the petitioner's grandmother to testify at trial and he failed to make sure that the petitioner's waiver of his right to testify at trial was both knowing and voluntary.

On June 24, 1993 the Post Conviction Court held an evidentiary hearing to take the testimony of the petitioner's grandmother. On May 26, 1995 the Post Conviction Court entered an order denying relief without holding a hearing to consider the petitioner's claim that his right to testify was denied by his

lawyer's decision to waive his right to testify at trial. The petitioner appealed to the Superior Court of Pennsylvania. (Commonwealth v. George Trudel, No. 2330 PHL 95) The Superior Court affirmed the post conviction court's decision regarding the petitioner's grandmother but remanded the case to the Common Pleas Court with instructions to hold an evidentiary hearing concerning the petitioner's claim that his right to testify was denied. The petitioner and his lawyer testified at an evidentiary hearing on January 30, 1997.

The petitioner said he told his lawyer he wanted to testify and he expected to testify until the end of the trial. Near the end of the trial his lawyer said, "I'm not going to put you on the stand." (NT, 1-30-97, page 60) This conversation between petitioner and his lawyer took place at counsel table while the

trial was in progress. (NT, 1-30-97, page 61) The petitioner did not object when his lawyer told him he was not putting him on the stand because he trusted his lawyer, believed his lawyer had the authority to make that decision and did not know he could overrule his lawyer. (NT, 1-30-97, page 61, 62, 74,87 and 88)

Petitioner's counsel, George Newman, Esquire, said he had no recollection of the specifics of any conversation with the petitioner regarding the subject of the petitioner testifying during the trial. (NT, 1-30-97, page 6) Counsel remembered he was opposed to the petitioner testifying during the trial and he probably conveyed his opinion regarding that subject to the defendant. (NT, 1-30-97, page 6) Counsel was unable to say what his general practice was concerning informing his client that the decision to testify was a

decision the client had to make for himself. (NT, 1-30-97, pages 22 and 29) Finally, counsel could not say whether the petitioner acquiesced in counsel's decision not to put him on the stand, or whether the petitioner made his own decision not to testify based on counsel's advice. (NT, 1-30-97, pages 24,26 and 31)

It was also established that petitioner's counsel was an experienced criminal defense lawyer in 1988 when he represented petitioner, that counsel said in his opening statement to the jury that no decision had been made as to whether or not the petitioner would testify during the trial, (NT, 12-6-88, page 31), that counsel briefly mentioned the petitioner's decision not to testify in his closing argument, (NT, 12-8-88, page 460), that the trial Judge mentioned the defendant's

right to testify in the court's instructions to the jury at the end of the trial, (NT, 12-8-88, page 521) and that the petitioner had some prior experience with the criminal justice system before his murder trial. (NT, 1-30-97, pages 63,64 and 65)

Based on this record the Post Conviction Court determined that counsel informed petitioner of his right to testify and petitioner personally elected not to take the stand during his trial.

The petitioner appealed to the Pennsylvania Superior Court which affirmed the post conviction court on June 2, 1998. (Commonwealth v. George Trudel, No. 01478 PHL97) The petitioner filed a Petition For Allowance of Appeal in the Supreme Court of Pennsylvania which was denied on December 23, 1998.

On or about May 27, 1999 the petitioner filed a Petition for Habeas Corpus under 28 U.S.C. Section 2254 in the United States District Court for the Eastern District of Pennsylvania at No. 99 CV- 2734.

The case was assigned to Magistrate Judge Carol Sandra Moore Wells. On December 30, 1999 Judge Wells filed a Report and Recommendation recommending that the Petition for Writ of Habeas Corpus be denied and dismissed without an evidentiary hearing. The Report and Recommendation was served on the petitioner on January 6, 2000 and petitioner filed Objections to the Report and Recommendation on January 12, 2000. On January 27, 2000 the District Court entered an Order overruling the petitioner's objections to the Report and Recommendation of the Magistrate Judge,

approving and adopting the Report and Recommendation, denying the Petition for Writ of Habeas Corpus and denying a Certificate of Appealability.

On February 16, 2000 the petitioner filed a Notice of Appeal in the United States District Court and an Application for a Certificate of Probable Cause in the United States Court of Appeals for the Third Circuit at No. 00-1099.

On December 8, 2000 the United States Court of Appeals for the Third Circuit entered an Order denying the request for a certificate of appealability because the petitioner failed to make a substantial showing of a denial of a constitutional right.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

This Court has determined that a defendant in a criminal case has a fundamental constitutional right to testify in his or her own defense under the Fifth, Sixth and Fourteenth Amendments. Rock v. Arkansas, 483 U.S. 44, 107 S.Ct. 2704, 97 L.Ed. 2d 37(1987).

As such, the right to testify is personal to the defendant and cannot be waived by counsel regardless of strategic or tactical considerations. United States v. Teague, 953 F.2d 1525, cert. den. 113 S. Ct. 127, 121 L.Ed. 2d 82 (1992); United States v. DiSalvo, 726 F. Supp. 596 (1989); DeLuca v. Lord, 858 F. Supp. 1330 (1994).

This Court has also decided that a valid waiver of a fundamental constitutional right by a criminal

defendant requires an intentional relinquishment or abandonment of a known right that should appear on the record in the trial court. Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). In Carnley v. Cochran, 369 U.S. 506, 82 S. Ct. 884, 8 L.Ed. 2d 70 (1962), this Court held it was impermissible to presume waiver of a fundamental constitutional right from a silent record. In Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed. 2d 274 (1969), this Court held the record must show a defendant's waiver of a fundamental constitutional right is personal, knowing and intelligent.

The petitioner contends that neither the trial court record nor the post conviction court record affirmatively show that the petitioner made a personal, knowing and intelligent waiver of his right to testify.

The state post conviction court found that trial counsel informed the petitioner that the ultimate decision whether or not he would testify was up to the petitioner because counsel was an experienced criminal defense lawyer. This finding was made despite counsel's inability to remember what he told the petitioner and his inability to remember his general practice concerning telling a client that the decision whether or not he would testify had to be made by the client. The post conviction court found that the petitioner personally elected not to take the stand because the petitioner was "knowledgeable about court procedure" and the trial court record showed that the petitioner's right to testify was mentioned several times during the trial by the trial judge and defense counsel.

The trial court record revealed the following:

During his opening statement defense counsel said, "You may or may not hear from George. We haven't decided that yet...." (NT, 12-6-88, page 31) In closing argument defense counsel said, "George Trudel had a right to decide that he was going to say I'm not going to take the witness stand, I don't believe you proved this case against me..." (NT, 12-8-88, page 460) In the Charge to the jury the trial judge said, "It is entirely up to the defendant in each criminal trial whether or not to testify."(NT, 12-8-88, page 521)

Even if we assume the petitioner heard and understood these comments, counsel's remark during the opening statement proves no decision had been made at that stage of the trial, counsel's closing argument and the judge's instructions to the jury both

took place after the defense had rested without calling the petitioner to the stand.

As far as the petitioner's so-called experience with the criminal justice system it consisted of some minor scrapes with the law and there was no evidence that the petitioner's prior experience included a trial or the decision whether or not to testify at a trial.

In addition, it is well established that a criminal defendant's acquired practical knowledge of the criminal justice system is not a substitute for competent professional advice. United States v. DiSalvo, 726 F. Supp. 596 (E.D. of Pa. 1989) and DeLuca v. Lord, 858 F. Supp. 1330 (1994).

The conclusion by the post conviction court and the Pennsylvania Superior Court that the petitioner's delay in raising this claim suggests a lack of candor is

also unfair. Trial counsel continued to represent the petitioner until October 23, 1990 when the Pennsylvania Supreme Court denied the petitioner's direct petition for allowance of appeal. In addition, the petitioner trusted his lawyer and did not question his lawyer's authority to decide that the petitioner would not testify during the trial until he was informed otherwise by post conviction counsel. (N.T., 1-30-97, pages 61,62,74,87 and 88) It is not petitioner's fault that no evidentiary hearing was held until January 30, 1997.

Furthermore the District Court's conclusion that the petitioner's constitutional claim was procedurally flawed because of a failure to exhaust state remedies is erroneous. The District Court found that the petitioner had not raised a ccnstitutional question

regarding the waiver of his right to testify until his state post conviction proceeding reached the Pennsylvania Supreme Court. On the contrary, the record of the state post conviction proceeding reveals that the petitioner raised the constitutional question at all levels of the state court system.

In the post conviction court the petitioner said, "the defendant was deprived of his constitutional right to testify in his own defense by counsel's decision not to call him as a witness at trial." (Petition for Post Conviction Relief, page 4,Commonwealth v. George Trudel, August Term, 1987, Nos. 2299-2302) In a memorandum of law filed to support his post conviction petition in the Court of Common Pleas of Philadelphia, Pennsylvania the petitioner said, "the evidence established that the defendant's waiver of his

right to testify was not knowing and voluntary" and "The decision to waive defendant's right to testify was made by defendant's counsel not the defendant." (Defendant's memorandum of law,Commonwealth v. George Trudel, August Term, 1987, Nos. 2299-2302) In the Superior Court of Pennsylvania the petitioner said, " In this case the defendant contends he was deprived of a fundamental constitutional right because counsel's waiver of that right was not an intentional relinquishment or abandonment of that right by the defendant himself."(Appellant's Brief, Superior Court of Pennsylvania, page 21, Commonwealth v. Trudel, No. 01478PHL97) The petitioner also said, "...the defendant's waiver of his right to testify was not knowing and voluntary and as a result the defendant was deprived of a fundamental constitutional right."

(Appellant's brief, Superior Court of Pennsylvania, page 14, Commonwealth v. Trudel, No. 01478PHL97) It is not the petitioner's fault that the post conviction court in Philadelphia and the Superior Court of Pennsylvania chose to refer to petitioner's claim as one involving ineffective assistance of counsel. At every level in the state court system the petitioner raised the constitutional issue.

For the reasons already discussed the District Court's conclusion that petitioner failed to rebut the presumptively correct factual determinations of the state post conviction court is not supported by the record.

The petitioner respectfully contends that the Superior Court of Pennsylvania and the United States Court of Appeals for the Third Circuit have decided an

important question of constitutional law that has not been, but should be, settled by this Court. A criminal defendant's waiver of his right to testify in his own defense must be voluntary, knowing and personal. In this case the record in the trial court and post conviction court is ambiguous at best. The petitioner should receive the benefit of any doubts created by the ambiguous state of the record.

Respectfully submitted:

Date: 5-2-01

John N. DelCollo, Esquire
Counsel for Petitioner

Date: 5-2-01

F. Kirk Adams, Esquire
Co-Counsel for Petitioner

CERTIFICATE OF SERVICE

F. Kirk Adams, Esquire, Counsel for petitioner hereby certifies that he served a copy of the within Petition for a Writ of Certiorari on the attorney for the Commonwealth of Pennsylvania, Deputy District Attorney, Donna G. Zucker, Esquire, Chief of the Federal Litigation Department of the Philadelphia District Attorney's Office at 1421 Arch Street, Philadelphia, PA. 19102, by U.S. Mail, postage prepaid, on the date set forth below.

Date: 5-11-01

F. Kirk Adams